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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ROBERT GARCIA,

12 Petitioner,

13 v.

14 JIMMY WALKER, Warden,

15 Respondent.

Civil No. 08-1441 W (WMc)

**AMENDED NOTICE REGARDING  
POSSIBLE FAILURE TO EXHAUST  
AND ONE-YEAR STATUTE OF  
LIMITATIONS**

16 Petitioner, a state prisoner, has filed a Petition for Writ of Habeas Corpus pursuant to 28  
17 U.S.C. § 2254. On August 19, 2008, this Court issued a Notice Regarding Possible Failure to  
18 Exhaust in this case [doc. no. 3]. However, due to a clerical error, the Order's caption  
19 erroneously named "Debra Dexter, Warden" as Respondent instead of "Jimmy Walker, Warden"  
20 – the proper Respondent named by Petitioner in this case. Thus, the Court issues this amended  
21 Notice to reflect the proper respondent in this case.

22 **THIS NOTICE PROVIDES IMPORTANT INFORMATION RELATING TO PETITIONS AND IS**  
23 **ISSUED IN EVERY CASE REGARDLESS OF WHETHER THE PETITIONER ALLEGES FULL**  
24 **EXHAUSTION OF STATE JUDICIAL REMEDIES.**

25 **REQUIREMENT THAT PETITIONER EXHAUST STATE JUDICIAL REMEDIES**

26 Generally, applications for writs of habeas corpus that contain unexhausted claims must  
27 be dismissed. See Rose v. Lundy, 455 U.S. 509, 522 (1982). However, federal courts have the  
28 discretion to deny a habeas application on the merits notwithstanding a petitioner's failure to

1 fully exhaust state judicial remedies. See 28 U.S.C.A. § 2254(b)(2) (West 2006); Liegakos v.  
 2 Cooke, 106 F.3d 1381, 1388 (7th Cir. 1997). To exhaust state judicial remedies, a California  
 3 state prisoner must present the California Supreme Court with a fair opportunity to rule on the  
 4 merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c);  
 5 Granberry v. Greer, 481 U.S. 129, 133-34 (1987). The petitioner must have raised the very same  
 6 federal claims brought in the federal petition before the state supreme court. See Duncan v.  
 7 Henry, 513 U.S. 364, 365-66 (1995). For example, “[i]f a habeas petitioner wishes to claim that  
 8 an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the  
 9 Fourteenth Amendment, he must say so, not only in federal court, but in state court.” Id. at 366.

### 10 ONE-YEAR STATUTE OF LIMITATIONS

11 Further, the Court cautions Petitioner that a one-year period of limitation applies to a  
 12 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State  
 13 court. The limitation period begins to run on the latest of:

14 (A) the date on which the judgment became final by the  
 15 conclusion of direct review or the expiration of the time for seeking  
 such review;

16 (B) the date on which the impediment to filing an application  
 17 created by State action in violation of the Constitution or laws of the  
 United States is removed, if the applicant was prevented from filing  
 by such State action;

18 (C) the date on which the constitutional right asserted was  
 19 initially recognized by the Supreme Court, if the right has been  
 20 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

21 (D) the date on which the factual predicate of the claim or  
 22 claims presented could have been discovered through the exercise  
 of due diligence.

23 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006). If the federal petition is filed after the statute of  
 24 limitations has run, the petition will be summarily dismissed.

25 The statute of limitations does not run while a properly filed state habeas corpus petition  
 26 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
 27 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
 28 when its delivery and acceptance [by the appropriate court officer for placement into the record]

1 are in compliance with the applicable laws and rules governing filings.”). However, the filing  
2 of a federal habeas petition does not toll the statute of limitations. Duncan v. Walker, 533 U.S.  
3 167, 181-82 (2001).

#### 4 CONCLUSION

5 This Court has not yet determined whether or not all of Petitioner’s claims have been  
6 exhausted. That determination will take place later in the proceedings. However, Petitioner  
7 should consider that if state court remedies have not been exhausted, “the clock may be ticking”  
8 on his one-year statute of limitations, and/or that the one-year period may have already expired.  
9 If a petitioner waits until this Court determines whether all claims contained in a petition have  
10 been exhausted, it may be too late to exhaust. Therefore, if a petitioner knows that one or more  
11 claims have not been exhausted, the petitioner should consider the options with respect to  
12 exhausting those claims. Those options include:

13 (1) filing a request for voluntary dismissal of unexhausted claims and  
14 proceeding in the current federal action with only the exhausted claims (If  
15 Petitioner chooses this option, his abandoned unexhausted claims may be forever  
16 barred from federal court habeas review.); or

17 (2) filing a request for dismissal without prejudice of the current federal  
18 action and going to state court to exhaust all unexhausted claims (Petitioner should  
19 consider whether all of his federal claims will be barred by the one-year statute of  
20 limitations before choosing this option.).

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1 This Notice is not providing legal advice. It merely lists two of the options that may be  
2 available to petitioners who file unexhausted claims in federal court. The decision on how to  
3 proceed is solely and exclusively up to Petitioner.

4 **IF PETITIONER IS CERTAIN HIS FEDERAL PETITION CONTAINS ONLY EXHAUSTED**  
5 **CLAIMS, HE NEED NOT TAKE ANY FURTHER ACTION.**

6 **PETITIONER IS SO NOTIFIED.**

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8 DATED: August 26, 2008

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10 Hon. William McCurine, Jr.  
11 U.S. Magistrate Judge  
United States District Court

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